

Appendix.

SUPREME COURT,

GENERAL TERM—FIRST DEPARTMENT.

March General Term, 1884.

NOAH DAVIS, *P. J.*,
JOHN R. BRADY, and
CHAS. DANIELS,
Justices.

EDMUND COFFIN, JR.,
Appellant,

against

JOHN SCOTT, *et al.*,
Respondents.

Appeal from judgment of the Special Term dismissing complaint.

ISIDOR GRAYHEAD, for Appellant.

S. G. McNARY, for Respondents.

DAVIS, P. J.—The defendants are lessees of a pier at the foot of West Thirty-fourth Street, on the North River, holding under a demise of the corporation of the City of New York. They are co-partners as dealers in ice, and have, under their lease from the City, occupied and used the pier for the purpose of unloading vessels bringing ice thereto,

and have used the waters of the river on the southerly side of the pier for the purpose of approaching the pier and unloading their vessels. They have also erected and occupied temporary structures on the pier for their ice-stands and offices. The plaintiff claims to recover for the wharfage or use of the pier under a grant made to him in the year 1881 by one Henry R. Dunham, Junior, who derived his title from Henry R. Dunham, deceased, to whom the City on the 16th of December, 1852, granted certain lands under water lying between property owned by said Dunham and the westerly line of the City, which then was the westerly line of Thirteenth Avenue.

According to the plaintiff's theory, the City of New York, in the year 1857, while the title of the property was in Dunham, wrongfully took possession, claiming title at and constructing the pier now demised to the defendants, to the exclusion of Dunham and in violation of his alleged rights, and have since occupied the same by their tenants, and were in such occupation by the defendants as tenants at the time of the alleged conveyance to the plaintiff. It is difficult to see how the plaintiff can maintain his action upon his own theory, because the City, as landlord of the defendants, was in possession holding adversely and in hostility to the alleged rights of his grantor at the time of the execution of the conveyance to the plaintiff, and such conveyance, as to the City and the defendants, it seems to us, would be void under the statute.

This point was not suggested on the argument, and we shall not therefore consider it in disposing of the case, although it strikes us as one to which the attention of the plaintiff's counsel may properly be drawn.

By the conveyance made by the City to Dunham the land upon which the pier leased to the defendants is constructed was expressly reserved from the grant. The language of the reservation is as follows:

“Saving and reserving from and out of the hereby granted premises so much thereof as by said map annexed forms parts or portion of the Thirteenth avenue and Thirty-fourth street, for the uses and purposes of public streets, avenues and highways, as hereinafter mentioned.”

The fee, therefore, of the portion of Thirty-fourth Street on which the pier is erected has remained all the while in the City, and the grant under which the plaintiff claims conveys to him no interest in such fee. This question was considered in *Langdon v. The Mayor* (93 N. Y. 129), in which it was held that a similar reservation did not have the effect of simply reserving an easement for a street, but as excepting the soil upon which it was to be constructed, from the operation of the conveyance. And in a late case before Mr. Justice Daniels at Special Term, where an injunction was sought against parties seeking to construct under the authority of the City certain docks within the line of Forty-second Street, it was held that a similar reservation in a water grant had the effect to continue the fee of the land in the City.

It is found in this case that the pier is wholly built within the lines of the street and upon the land excepted from the grant by and at the expense of the Corporation of the City of New York. It seems very clear that the plaintiff has no title or interest therein which entitles him to claim the ownership of such pier, or to demand wharfage or rent for its use.

The plaintiff owns, by virtue of his grant, the land under the waters south of the pier. The defendants show that the waters over those lands are now part of the navigable waters of the Hudson River. Neither the plaintiff nor the person through whom his title is derived has filled in or occupied those lands in any manner, nor have they been used by the defendants in any other mode or way than in approaching the pier for the purpose of unloading their cargoes and lying at the pier while discharging cargoes. The plaintiff has no legal right to exact compensation for the use of the navigable waters of the river.

In *The People v. Vanderbilt* (26 N. Y., 292), the Court says:

“The right of property in the soil or bed of a navigable river or arm of the sea, and the right to use the waters for the purposes of navigation are entirely separate and distinct. The first of these rights is by the common law vested *prima facie* in the sovereign power; that is, in England, in the King; here in the people; but may be alienated by the King or people so as to become vested in an individual or corporation. The second is a right common to the whole people and it is vested in the public at large.”

See also, *Taylor v. Atlantic Mutual Insurance Company* (37 N. Y. 283), where it was said of the waters of the East River:

“These waters are part of the arm of the sea and are a public highway and navigable to all.”

No other use is shown of these waters, or of the land under them, than, that of simply using them to navigate

the defendants' vessels to and from the pier for the purpose of unloading them in their business. No evidence is given to show that the defendants' vessels have been accustomed to lie at anchor in those waters, or to do any other act that would indicate a use of the soil belonging to the plaintiff in such a manner as to entitle him to a claim of shipping or anchorage.

As we understand the provisions of the grant of the City of Dunham, it was the intention not only to reserve the fee of the street, but exclusively to reserve all the rights to the use of the pier which was contemplated to be constructed within the boundaries of Thirty-fourth Street. The deed speaks of the business done on the westerly end of the pier, evidently contemplating that the lands under water granted to the plaintiff on the southerly side of the street might also be docked out to the westerly side of Thirteenth Avenue in such manner as to require all business done at the pier or dock to be brought to the westerly end, and that so much as came to the westerly end of that part of the pier in the street was exclusively reserved to the City whoever might build the pier.

On a correct construction of the grant, the reservation or exception is necessarily, we think, of the whole of the pier built within the bounds of Thirty-fourth Street, and the right to use navigable waters on the south side of the present pier until the same are lawfully occupied by other piers or docks and that plaintiff cannot claim that he is injured by the fact that the City has constructed a pier in Thirty-fourth Street, which it might have required Dunham, its grantor, or his assignees, to have built.

There does not appear to us to be any ground upon which the plaintiff had the right to recover. His complaint was, therefore, rightly dismissed, and the judgment should be affirmed, with costs.

I concur.

CHAS. DANIELS.

I concur.

J. R. B.

(Reported in part in 19 Weekly Digest, 413; aff'd. 102 N. Y., 730 [Mem.]).